MIDFORD (M) SDN. BHD. & ANOR.

v.

THE DIRECTOR-GENERAL OF ROYAL CUSTOMS, MALAYSIA & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ANUAR ZAINAL ABIDIN J
[FEDERAL TERRITORY CRIMINAL APPLICATION NO. CR 54-20-88]
15 JUNE 1989

CIVIL PROCEDURE: *Immunity - Jurisdiction - Whether the 5th respondent (Commonwealth of Australia) enjoyed pure absolute immunity from the jurisdiction of the Malaysian Court.*

The applicants on 16 September 1988 obtained an *ex parte* order *inter alia* requiring the respondents to return all documents and files seized by them belonging to the applicants. Further, that the respondents and their agents be restrained from conducting any further illegal searches/seizures on the premises of the applicants.

Subsequently, the 1st and 4th respondents filed a notice of motion to have the whole order of the Court made on 6 September 1988 set aside.

Held:

[1] The 5th respondent was not entitled to pure absolute immunity from the Malaysian Courts.

[2] The 5th respondent must explain its relationship with the 2nd and 3rd respondents as regards to the criminal liability of the 2nd and 3rd respondents and their apparent contempt of the Order of Court dated 16 September 1988.

[Ruling accordingly.]

For the both applicants - Hira Singh; M/s. Asbir, Hora Singh & Co.
For the 1st & 4th respondent - Abdul Alim bin Abdullah, DPP, Royal Customs & Excise Department
For the 5th respondent - Cecil Abraham; M/s. Shearn Delamore & Co.

JUDGMENT

Anuar Zainal Abidin J:

This is an application by the applicants by way of notice of motion on 16 September 1988 for the following orders *ex parte*:

1. That the 2nd, 3rd and 4th respondents do forthwith return all documents/files and any copies made of the said documents seized by them belonging to the applicants;
2. The respondents and their servant/agents be restrained from conducting any further illegal searches/seizures on the premises of Midford (M) Sdn. Bhd., its employees, agent or partners;
3. The 1st and 4th respondents and/or any of its agents or employees be restrained from assisting in any way whatsoever the 2nd, 3rd and 5th respondents in illegal searches and seizures and/or collection of evidence oral or documentary in any form whatsoever pertaining to Midford (M) Sdn. Bhd., from any Malaysian or Corporation within the jurisdiction of this Honourable Court;

4. The 2nd, 3rd and 5th respondents be restrained from conducting any unlawful searches and seizures and/or unlawfully collecting any evidence oral or documentary in any form whatsoever pertaining to Midford (M) Sdn. Bhd., from any employees, agents or partners of Midford (M) Sdn. Bhd., and/or any Malaysian citizen or Corporation or Government Department or its instrumentality within the jurisdiction of this Honourable Court.

5. That the 1st respondent and its agents be restrained from parting with any document or copies made thereof pertaining to the first applicant.

6. That 1st, 2nd, 3rd and 4th respondents be ordered to surrender to this Honourable Court any documents or files or statement obtained and any copies made thereof.

7. Such further or other relief that this Honourable Court may deem fit.

The notice of motion is supported by an affidavit of Sin Lee Kian affirmed on 16 September 1988, an employee of the 1st applicant and the affidavit of U. Mat, the 2nd applicant affirmed on 16 September 1988.

Having read the affidavit in support of the notice of motion, I am satisfied that *ex-facie*, I ought to and do give order in terms of the application.

The 1st and 4th respondents by notice of motion (Encl. 5) dated 21 September 1988 asked for the following orders:

(1) The whole order of Court made on 16 September 1988 upon the applicants *ex-parte* application be set aside in *toto*.

(2) All other proceedings be stayed until the final disposal of this application.

(3) The Court makes such further or other orders as it may deem fit.

(4) The cost of this application be borne by the applicants.

The grounds of this application are:

(i) That this Honourable Court has no jurisdiction to grant the relief sought by the applicants *vide* their application dated 16 September 1988.

(ii) That the proceedings adopted by the applicants herein in applying for the injunction in the aforementioned criminal application is misconceived in law as there are no provisions in the Criminal Procedure Code to enable this Honourable Court to grant the injunction sought.

(iii) That the aforesaid Order of Court made on 16 September 1988 was irregularly obtained by an *ex-parte* application.

The notice of motion is supported by an affidavit (Encl. 6) of Abdul Hamid bin Embong affirmed on 21 September 1988. The 4th respondent filed his affidavit on 18 October 1988.

On 18 October 1988, the Deputy Public Prosecutor for the Royal Customs and Department, Malaysia amended its notice of motion by a letter for an additional prayer:

That the investigation carried out by the 1st and 4th respondents were made pursuant to their powers and obligation under the Nairobi Convention on Mutual Administrative Assistance for the Prevention Investigation and Repression of Custom Offences 1977 and the Customs Act 1967.

The notice of motion was set down for hearing on 4 November 1988 but was adjourned to 9 December 1988 with a view to allow the Deputy Public Prosecutor to ensure compliance of the order of this Court dated 16 September 1988 by all parties.

On 9 December 1988, the 5th respondent appeared by its Counsel, Mr. Cecil Abraham who informed the Court that he was representing the 5th respondent and was holding watching brief for the 2nd and 3rd respondents. The learned Deputy Public Prosecutor informed the Court that he had communicated with his counterpart in Australia but she had refused to comply with the Court's order leaving the Royal Malaysian Customs in an embarrassing position.

On 2 December 1988, Messrs. Shearn Delamore & Co. filed a notice of motion (Encl. 9) and it was fixed for hearing on 9 December 1988. It is supported by the affidavit of Noel Allanson, the Counsellor (Administration) and the Counsel-General of the Australian High Commission in Kuala Lumpur affirmed on 2 December 1988.

The only issue argued before me at this hearing is that the 5th respondent being a foreign sovereign state is enjoying pure absolute immunity from the jurisdiction of the Malaysian Courts and require this Court to disclaim jurisdiction. The 5th respondent reserved the right to argue on other grounds depending on the outcome of to-day's hearing. It is not disputed that the 5th respondent is a foreign sovereign state but the applicants contend that the 5th respondent and its agents, the 2nd and 3rd respondents do not enjoy pure absolute immunity. The Counsel for the applicants, Mr. Hira Singh has argued and submitted extensively on the question of state immunity and has sent in lengthy written submissions.

As the whole matter has not yet been fully argued, the Court gives a ruling on this point to enable the rest of proceedings to continue.

In my judgment, under the circumstances of this particular case, the 5th respondent is not entitled to pure absolute immunity from the jurisdiction of the Malaysian Courts. The Court is fortified by the fact that if this case were to be in English Court or if the 5th respondent were to be Malaysia in Australian Court, the 5th respondent would not be granted the order asked for, especially the immunity from criminal jurisdiction of the Court.

In the event, the 5th respondent must explain to the Court its relationship or connection with the 2nd and 3rd respondents as regards to the criminal misconduct and liability of the 2nd and 3rd respondents and their apparent contempt of the Order of this Court dated 16 September 1988.

The Court strongly urges that the learned Deputy Public Prosecutor consider preferring criminal charges and contempt proceedings, if any, against the respondents who are culpable.

Also found at [1990] 1 CLJ 936